APPEAL NO. 002264

Following a contested case hearing held on September 13, 2000, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer, resolved the disputed issues by determining that the respondent (claimant) was entitled to supplemental income benefits (SIBs) for the third and fourth quarters and that the appellant (carrier) was not relieved of liability for the payment of SIBs for the third quarter due to the late filing of the application for SIBs for the third quarter. The carrier appealed the hearing officer's determination that the claimant was entitled to SIBs for the third and fourth quarters. The claimant responds that the hearing officer's determinations were supported by the evidence and should be affirmed.

DECISION

Reversed and rendered.

The claimant sustained a compensable injury on _____. The parties stipulated that the claimant reached maximum medical improvement on July 24, 1998, with a 20% impairment rating and did not commute any portion of his impairment income benefits. The parties also stipulated that the qualifying periods for the third and fourth quarters of SIBs were from December 3, 1999, through March 2, 2000, and March 3, 2000, through June 1, 2000, respectively. It was undisputed that the claimant did not seek any employment during either qualifying period and that a determination of whether the claimant had made a good faith effort to seek employment commensurate with his ability to work would depend on the hearing officer's determination of whether the claimant met the definition of "good faith" set forth in Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d)(4) (Rule 130.102(d)(4)) which provides that:

> [a]n injured employee has made a good effort to obtain employment commensurate with the employee's ability to work if the employee:
>
> * * * *
>
> has been unable to perform any type of work in any capacity, has provided a narrative report from a doctor which specifically explains how the injury causes a total inability to work, and no other records show that the injured employee is able to return to work[.]

With regard to the foregoing requirements, the hearing officer made the following findings of fact:

> 8. During the qualifying periods for the 3rd and 4th quarters, Claimant was been [sic] unable to perform any type of work in any capacity.

9. Claimant has provided a narrative report dated July 26, 1999 from [Dr. H] which specifically explains how Claimant's _____ injury cause [sic] Claimant a total inability to work.

10. No other records show that Claimant is able to return to work, because the medical record dated July 13, 2000 from [Dr. B] is general and conclusive, because this medical record appears to be missing page 2 of 6, and because [Dr. B's] conclusion that Claimant is able to work is at variance with the functional capacity testing which appears to indicate that on at least two occasions during testing, Claimant began to shake and was unable to finish testing.

The carrier urges that the narrative report of by the claimant's doctor is conclusory and does not provide a specific explanation of how the claimant's compensable injury causes a total inability to work. We note that although Dr. H's report predates the qualifying periods at issue by some months, it does provide specific information on the claimant's physical condition. However, we disagree that it provides an explanation of how the injury results in the total inability to work. In the report, Dr. H states:

> In summary, this patient is unable to perform any type of duties on a basis sufficiently consistent to render him a valuable and useful worker to any employer. The restrictions which would be placed upon him would be abundantly stringent that his productivity would be impeded to such a degree as to render [the claimant] an ineffective employee.

The foregoing, rather than showing that the claimant has no ability to work, simply addresses the claimant's employability and effectiveness as an employee. A lack of employability and/or an inability to engage in gainful employment do not equate to a total inability to work.

The claimant testified that his condition has not improved since his surgery in 1998 and that it has actually worsened over time. The hearing officer could either accept or reject the claimant's testimony regarding his deteriorating condition and evaluate Dr. H's report in light of his determination, assigning the report whatever credibility he deemed that it deserved. Section 410.165(a). In doing so, the hearing officer determined that the report constituted a narrative report explaining how the injury resulted in a total inability to work during the qualifying periods at issue. For the reasons stated above, we do not agree and find that the hearing officer's determination that Dr. H's report constitutes a narrative explaining how the compensable injury causes a total inability to work is against the great weight of the evidence and is clearly wrong. We reverse the finding of the hearing officer.

The claimant also presented a report from his treating doctor, Dr. He, dated June 30, 2000, which states that the claimant "is unable to return to his employment or any kind of work due to his persistent pain and condition of a pre-surgical nature." The hearing

officer did not find that the foregoing reference constituted a specific explanation of how the compensable injury causes a total inability to work, nor do we.

We have stated in the past that the mere existence of a medical report stating the claimant had an ability to work does not necessarily mandate that a hearing officer find that other records showed an ability to work. Texas Workers' Compensation Commission Appeal No. 000820, decided May 31, 2000. The hearing officer may still look at the evidence and determine whether the other records showed an ability to work, as opposed to stating that the claimant had an ability to work. Texas Workers' Compensation Commission Appeal No. 000725, decided May 22, 2000. We have also held that a hearing officer should explain why a record, which appears on its face to show an ability to work, does not in fact show any ability to work. Texas Workers' Compensation Commission Appeal No. 002095, decided October 18, 2000. The hearing officer stated that he did not believe that the report from Dr. B showed an ability to work because page 2 was missing from the report and Dr. B's report was general, conclusive, and at variance with the functional capacity evaluation (FCE). After a careful review of the report, we find that the hearing officer's determination that the report does not show an ability to work is against the great weight and preponderance of the evidence. Dr. B had the results of the FCE before him when he determined that the claimant had the ability to engage in sedentary to light-duty employment, albeit with restrictions. We note that the facsimile transmission of the report constituted 6 pages; that if the title page of the report is considered, there are 6 pages to the report; that the report states that it consists of 6 pages; and that the report does not appear to be missing any information. In his report, Dr. B states:

> Based on [the claimant's] current clinical presentation, I would agree that he has long stabilized. There is nothing in his medical records, clinical history, or current clinical findings that would preclude him from traveling to and from work, being at work, and performing appropriate tasks and duties. Because of significant pain complexes, [the claimant] will require ongoing work restrictions and/or limitations.

The body of the report noted that a comparison of the isometric and performance data derived from the FCE shows that the claimant's work ability falls between the categories of sedentary and light duty. In light of the results contained in the FCE and Dr. B's evaluation based upon the FCE, the clinical evaluation of the claimant, and a review of the claimant's medical records, we find that the hearing officer's determination that Dr. B's report did not show an ability to work is against the great weight of the evidence and is clearly wrong.

The hearing officer further determined that the claimant had no ability to work during the qualifying periods for the third and fourth quarters for SIBs. In so finding, the hearing officer necessarily relied on his determinations that Dr. H's report explained how the injury caused a total inability to work and Dr. B's report did not show any ability to work. Because Dr. H's report did not explain how the injury causes a total inability to work and Dr. B's report did show an ability to work, we reverse the hearing officer's determinations that the

claimant had a total inability to work during the qualifying periods for the third and fourth quarters and that he attempted in good faith to obtain employment commensurate with his ability to work.

An appeals level body is not a fact finder, and it does not normally pass upon the credibility of witnesses or substitute its own judgement for that of the trier of fact even if the evidence could support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). However, because we conclude that the hearing officer's findings on the good faith criterion were so against the great weight and preponderance of the evidence as to be manifestly unjust, we reverse the hearing officer's decision that the claimant is entitled to SIBs for the third and fourth quarters and render a new decision that the claimant is not entitled to SIBs for either the third or fourth quarters.

Kenneth A. Huchton
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

CONCURRING OPINION:

I concur, but for the reason that I believe that the report of Dr. Blair (Dr. B) is a record that "shows" an ability to work, however limited, during the qualifying periods in issue. It is worth repeating that the ability to work need not be analyzed solely in terms of full-time employment, and if the ability to work is part-time only, then only part-time jobs need be sought.

Susan M. Kelley
Appeals Judge